Supreme Court, U.S.
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No. 96-887

In The

Supreme Court of the United States

October Term, 1996

WAKE COUNTY and EMMETT CURL, in his capacity as Wake County Assessor,

Petitioners,

vs.

EDWARD VALVES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

RESPONDENT'S BRIEF IN OPPOSITION

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RULE 29.6 LISTING

Respondent Edward Valves, Inc. has no nonwholly owned subsidiaries. Its parent corporation is M&FC Holding Co., Inc., whose parent corporation is BTR Inc., whose parent corporation is BTR Dunlop Inc., whose parent corporation is BTR Dunlop Holdings (Delaware), Inc., whose parent corporation is BTR International Ltd., whose parent corporation is BTR plc.

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STATEMENT OF JURISDICTION

For the reasons set forth in Points I & II, *infra*, Respondent Edward Valves, Inc. ("Edward Valves") contends that this Court lacks jurisdiction under 28 U.S.C. § 1257(a) to review the interlocutory order of the North Carolina Supreme Court.

STATEMENT OF THE CASE

Edward Valves commenced this action in the state trial court in 1991 by the filing of a Complaint against Petitioners Wake County and Emmett Curl, in his capacity as Wake County Assessor, (collectively referred to herein as "the County"). The Complaint contained seven claims for relief, principally, but not exclusively, related to the County's actions with regard to the *ad valorem* taxation of Edward Valves' engineering drawings for the 1990 tax year. Specifically, Edward Valves contended that the taxation of its engineering drawings violated the equal protection clauses of the federal and North Carolina Constitutions (Second Claim) and 42 U.S.C. § 1983 (Sixth Claim), that the County was estopped from taxing the engineering drawings (Third Claim), and that their taxation constituted clerical error (Fourth Claim); Edward Valves also challenged the propriety of the participation of a contingency-fee auditor in a 1990 audit of the company (First Claim). In addition to the claims relating to the taxation of the engineering drawings, Edward Valves separately challenged the circumstances under which the County denied it a hearing on an appeal to the County Board of Equalization and Review of its 1990 real property assessment (Seventh Claim) and further sought a refund on amounts paid in 1989 on certain personal property which Edward Valves contended was then located outside of the County and thus not subject to *ad valorem* taxation by the County (Fifth Claim).

On May 20, 1993, the trial court issued its Order and Judgment with respect to the County's motion to dismiss,

granting the motion with respect to Edward Valves' First and Third Claims relating to the contingency-fee auditor and estoppel. (Petitioners' Appendix ("Pet. App."), at 25a.) That Order and Judgment was not appealed. On November 19, 1993, the County filed a motion for summary judgment with respect to the four remaining claims.[1] That motion for summary judgment was granted by the trial court by Order dated December 1, 1993, with respect to Edward Valves' four remaining claims: the Second, Fourth, Sixth and Seventh Claims for Relief. Edward Valves appealed that Order to the North Carolina Court of Appeals.

In an opinion filed on January 3, 1995, the North Carolina Court of Appeals reversed the grant of summary judgment in favor of the County and remanded the action for further proceedings in accordance with its opinion. (Pet. App. 24a.) With respect to the taxation of the engineering drawings, the Court of Appeals held that the methodology used by the County violated both the federal and North Carolina Constitutions and also violated 42 U.S.C. § 1983 and § 105-284(a) of the North Carolina General Statutes. (Pet. App. 23a.)[2] The Court of Appeals held that the County's practice of taxing intangible and self-created intellectual property, such as Edward Valves' engineering drawings, only when it was capitalized by the taxpayer constituted "a purposeful, though somewhat informal, classification based upon an improper distinction between

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1. Prior to the hearing on the motion for summary judgment, the County agreed to refund taxes paid in 1989 on certain personal property located outside of the County (Fifth Claim). That agreement was embodied in a Consent Order and Judgment, entered by the trial court on December 1, 1993. (Pet. App. 26a.)

2. The Court of Appeals also ruled that Edward Valves' claim of clerical error (Fourth Claim) had been abandoned. (Pet. App. 20a.) Edward Valves did not contest that ruling.

taxpayers who owned the same class of property, self-created intangibles that have been sold and similar intangibles that have not been sold." (Pet. App. 21a.) The court also noted that the County itself conceded that it was aware of no other county in North Carolina which sought to implement a methodology such as the one challenged by Edward Valves. (Pet. App. 15a.) In ruling that the methodology was unconstitutional, the Court of Appeals stated that the holding of this Court in *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336 (1989), was "virtually dispositive" of the issues concerning the taxation of the engineering drawings in this case. (Pet. App. 21a-22a.) The North Carolina Court of Appeals also reversed and remanded the action on the issue of whether the County denied Edward Valves an opportunity to appeal the assessment of its real property. (Pet. App. 23a-24a.)

The County sought review of the opinion of the Court of Appeals in the North Carolina Supreme Court by way of petition for discretionary review and appeal. *(See* Pet. App. 6a.) Specifically, the County sought review of three questions: (1) "whether the Court of Appeals erred in holding that the County's taxation of [Edward Valves'] engineering drawings constitutes an illegal tax in violation of the Equal Protection Clause of the United States Constitution . . . and uniformity requirements . . . of the North Carolina Constitution" (Pet. App. 6a-7a); (2) "whether the Court of Appeals erred in reversing the trial court's order dismissing [Edward Valves'] real property claim" *(i.e.,* the denial of Edward Valves' appeal of the assessment of its real property (Pet App. 7a); and (3) "whether 42 U.S.C. § 1983 is an available avenue of relief upon which [Edward Valves] may base [its] equal protection claim." (Pet. App. 7a.)

In its opinion, issued June 13, 1996, the North Carolina Supreme Court ruled that it had improvidently allowed discretionary review with respect to the first two questions, (Pet.

App. 6a-7a), thereby reinstating the decision of the Court of Appeals in favor of Edward Valves on those claims. With respect to the third question, the Supreme Court modified the opinion of the Court of Appeals concerning 42 U.S.C. § 1983 and affirmed the earlier determination that the actions of the County violated that statute as well. (Pet. App. 12a.)

In analyzing the section 1983 question, the North Carolina Supreme Court summarized the County's contentions as (a) that Edward Valves was "not entitled to relief under section 1983 . . . absent an allegation or evidence demonstrating that [Edward Valves] does not have 'plain, adequate or complete' remedies at state law and (b) that Edward Valves was required to seek relief by first "exhausting state law remedies." (Pet. App. 7a.) The North Carolina Supreme Court explicitly rejected both contentions. Notwithstanding the existence of "overlapping state remedies," (Pet. App. 10a), the court held that the "type of Fourteenth Amendment interest that is implicated has important effects on the nature of the constitutional claim and the availability of § 1983 relief." (Pet. App. 10a, quoting *Daniels v. Williams*, 474 U.S. 327, 337 (1986) (Stevens, J., concurring).) The determination as to whether section 1983 relief was available would turn on whether Edward Valves was claiming a violation of its procedural due process rights — in which circumstance the constitutional violation "is not complete when the deprivation occurs [but only] unless and until the State fails to provide due process," (Pet. App. 11a, quoting *Zinermon v. Burch*, 494 U.S. 113, 124 (1990)) — or "a violation of a substantive constitutional right." (Pet. App. 11a.) In the latter circumstance, "the constitutional violation is complete as soon as the prohibited action is taken." (Pet. App. 11a, quoting *Daniels*, 474 U.S. at 338 (Stevens, J., concurring).) Here, the North Carolina Supreme Court found, Edward Valves had demonstrated "a substantive violation" of its constitutional right to equal protection and, therefore, it could "pursue Section 1983 remedies regardless of

the state statutory or administrative remedies provided for by the North Carolina Machinery Act." (Pet. App. 11a.) The court refused the invitation to declare those statutory and administrative remedies "plain, adequate and complete" as requested by the County. Instead, the court remanded the action to the trial court, noting that "on remand to the trial court, [Edward Valves] may only recover the amount of taxes illegally assessed once." (Pet. App. 11a-12a.)

The County thereafter filed a timely petition for rehearing solely on the grounds that the North Carolina Supreme Court's decision conflicted with this Court's decision in *National Private Truck Council, Inc. v. Oklahoma Tax Commission*, 115 S. Ct. 2351 (1995), again asserting that the state law provided an adequate remedy. That petition for rehearing was denied without opinion. (Pet. App. 28a.) Thereafter, the County filed its Petition for a Writ of Certiorari with this Court.

REASONS FOR DENYING THE WRIT

I.

THE INTERLOCUTORY ORDER OF THE NORTH CAROLINA SUPREME COURT IS NOT A FINAL JUDGMENT.

The sole basis of jurisdiction upon which the County relies in its Petition for a Writ of Certiorari is 28 U.S.C. § 1257. Under that statute, the United States Supreme Court has jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . ." This Court has interpreted the final judgment requirement to "preclude reviewability . . . where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest

court of the State." *Flynt v. Ohio*, 451 U.S. 619, 620 (1981) (ellipsis in original, quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)). This "prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a State Court." *Radio Station WOW*, 326 U.S. at 124. The requirement was "[d]esigned to avoid the evils of piecemeal review," and its "[h]istory bears ample testimony that it is an important factor in securing harmonious State-federal relations." *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 67 (1948). Although a decree is regarded as final "if nothing more than a ministerial act remains to be done, such as the entry of a judgment upon a mandate," *id.* at 68, "the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up — for example, where liability has been determined and all that needs to be adjudicated is the amount of damages." *Id.* The *Republic Natural Gas* Court marshaled the rationales supporting "abstention until what is organically one litigation has been concluded in the State," *id.* at 71, including the "potentiality of additional federal questions arising out of the same controversy," *id.* at 72, as well as the possibility that the case may later be resolved in a manner satisfactory to the losing party. *Id.* at 71.

Here, the Order of the North Carolina Supreme Court remanded this action to the trial court for more than a ministerial entry of judgment upon its mandate. Thus, upon remand, Edward Valves will be entitled (a) to entry of summary judgment in its favor with respect to its claim for refund under North Carolina law or damages under 42 U.S.C. § 1983,[3] (b) to move for costs

3. Unlike Rule 56 of the Federal Rules of Civil Procedure, Rule 56 of the North Carolina Rules of Civil Procedure explicitly provides that "[s]ummary judgment, when appropriate, may be rendered against the moving party." Here, the determination of the North Carolina Court of Appeals clearly contemplates entry of summary judgment in favor of Edward Valves on the issue of taxation of the engineering drawings. *(See* Pet. App. 17a.)

and attorney's fees under 42 U.S.C. § 1988, as well as the pertinent North Carolina statutory provision concerning costs and attorney's fees, and (c) to trial of its Seventh Claim concerning the assessment of its real property for the 1990 tax year. (Pet. App. 23a-24a.) These remaining matters are well beyond anything which this Court has found to be "ministerial" and, in fact, each contemplates significant remaining discretion on the part of the trial court upon remand. *See, e.g., Uphaus v. Wyman,* 360 U.S. 72, 75 (1959) (refusing to treat question as final where trial court, upon remand, retained "discretion with respect to the entry of an order to enforce the command of a subpoena for the production of correspondence"); *NAACP v. Williams,* 359 U.S. 550, 551 (1959) (refusing to find finality with respect to contempt citation when state court reserved the power to reduce the amount of the fine).

Even a prospective award of attorney's fees to Edward Valves upon remand may be resolved in a manner ultimately precluding review. First, under 42 U.S.C. § 1988(b), "the court, *in its discretion,* may allow the prevailing party . . . a reasonable attorney's fee as part of the costs" (emphasis added). Thus, if the trial court determines, in its discretion, not to allow Edward Valves attorney's fees, the County would have no "actual, concrete injury," *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172, 193 (1985), from which to seek review. Second, the trial court could award attorney's fees to Edward Valves, solely (or jointly under § 1988(b)), under section 6-21.5 of the North Carolina General Statutes which provides that the court "may award reasonable attorney's fees to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading." Here, the County's persistence in defending its assessment methodology in the face of the North Carolina Court of Appeals' determination that the holding in *Allegheny Pittsburgh Coal Co. v. County*

Commission of Webster County, 488 U.S. 336 (1989), was "virtually dispositive" of the issues concerning the taxation of the engineering drawings in this case, (Pet. App. 21a-22a), could constitute just such a nonjusticiable issue under the North Carolina statute entitling Edward Valves to an award of attorney's fees. *See Sunamerica Financial Corp. v. Bonham,* 328 N.C. 254, 258, 400 S.E. 2d 435, 439 (1991). In the event that Edward Valves was to obtain an award of attorney's fees solely under state law or under both state and federal law, such a judgment would be independently and adequately supported on non-federal grounds and thus not subject to review by this Court. *See* Point II, *infra.*

In any case, the judgment of the North Carolina Supreme Court is insufficiently final to permit review by this Court under 28 U.S.C. § 1257.

II.

THE JUDGMENT OF THE NORTH CAROLINA SUPREME COURT RESTS ON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS.

This Court has "long recognized that 'where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.' " *Michigan v. Long,* 463 U.S. 1032, 1038 n. 4 (1983) (quoting *Fox Film Corp. v. Muller,* 296 U.S. 207, 210 (1935)). As explained by the *Long* Court, the "jurisdictional concern is that we not 'render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.' " 463 U.S. at 1042 (quoting *Herb v. Pitcairn,* 324 U.S. 117, 126 (1945)). This Court has "power . . . to correct wrong judgments, not to

revise opinions." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977). In determining whether an independent and adequate state ground exists, this Court imposes a "requirement of a 'plain statement' that a decision rests upon" such grounds. *Michigan v. Long*, 463 U.S. 1032, 1042 (1983).

Here, the North Carolina Supreme Court allowed the ruling of the North Carolina Court of Appeals to stand concerning the illegality of the tax on Edward Valves' engineering drawings. (Pet. App. 6a-7a.) That ruling, in addition to its federal constitutional basis, also found the tax illegal based on violations of the "uniformity requirements of Article V, Section 2(2) of the North Carolina Constitution." (Pet. App. 6a.) In addition, the Court of Appeals' ruling explicitly held that the County's "methodology for taxing self-created intangible property . . . also violates North Carolina General Statutes § 105-284(a)."[4] (Pet. App. 23a.) Despite this multiplicity of grounds — both federal and state — upon which Edward Valves prevailed, the North Carolina Supreme Court noted that "on remand to the trial court, [Edward Valves] may only recover the amount of taxes illegally assessed once." (Pet. App. 11a-12a.) The County has not sought — and indeed could not seek — review of Edward Valves' entitlement to "recover the amount of taxes illegally assessed."

Any "correction" of the North Carolina Supreme Court's views on the subject of 42 U.S.C. § 1983 would "amount to nothing more than an advisory opinion" inasmuch as "the same judgment would be rendered by the state court," *Long*, 463 U.S. at 1042: *i.e.*, Edward Valves would recover the amount of taxes illegally assessed by the County.

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4. North Carolina General Statute § 105-284(a) requires that all property be assessed at its true value and that taxes be levied uniformly by counties.

Here, the County would have this Court grant certiorari to review a question, which although perhaps "intellectually interesting," *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955), does not reach "beyond the academic or the episodic." *Id.* As the North Carolina Court of Appeals stated, the County is the only one of North Carolina's one hundred counties utilizing the methodology challenged by Edward Valves here. *(See* Pet. App. 15a.) Moreover, as the North Carolina Supreme Court held, Edward Valves "may only recover the amount of illegally assessed taxes once." (Pet. App. 12a.) Under such circumstances, the County's contention that "use of Section 1983 by taxpayers in North Carolina will be intrusive and disruptive, and will have an undeniable chilling effect upon the actions of all County officers," (Petitioners' Brief ("Pet. Br."), at 14, internal quotation omitted), provides nothing more than a speculative rationale "to satisfy a scholarly interest," *Rice*, 349 U.S. at 74, concerning a question that has not arisen under the facts presented in this case and, indeed, may never arise at all.

III.

THE DECISION OF THE NORTH CAROLINA SUPREME COURT IS NOT IN CONFLICT WITH A DECISION OF THIS COURT OR A DECISION OF A STATE COURT OF LAST RESORT.

The County contends that the decision of the North Carolina Supreme Court "is flatly inconsistent with this Court's holding in *National Private Truck Council, Inc. v. Oklahoma Tax Commission*, 115 S. Ct. 2351 (1995)." (Pet. Br. at 4.) In *National Private Truck Council*, this Court — after assuming "without deciding that state courts generally must hear § 1983 suits," *id.* at 2355 — affirmed the refusal of the Oklahoma Supreme Court to grant injunctive or declaratory relief under 42 U.S.C. § 1983, holding that that statute does not "provide for injunctive or

declaratory relief against a state tax, either in federal or state court, when an adequate legal remedy exists." 115 S. Ct. at 2357. The taxpayers in *National Private Truck Council* had received refunds of the taxes in question and the Oklahoma Supreme Court explicitly held that "adequate remedies existed under state law." *Id.* at 2354.

In this case, unlike *National Private Truck Council,* the North Carolina Supreme Court twice — both in its original opinion and in its denial of the County's petition for rehearing — declined the County's explicit invitation to rule that North Carolina provides an adequate remedy under its state law. Instead, the North Carolina Supreme Court held, at least implicitly, that North Carolina's statutory and administrative remedies were not adequate in the face of "a violation of a substantive constitutional right" which is "complete as soon as the prohibited action is taken." (Pet. App. 11a, quoting *Daniels v. Williams,* 474 U.S. 327, 338 (1986) (Stevens, J., concurring).) Such a holding is in accord with the rulings of this Court on the analogous issue of whether a state remedy is "plain, speedy and efficient" under the federal Tax Injunction Act, 28 U.S.C. § 1341.[5] *See, e.g. Rosewell v. LaSalle National Bank,* 450 U.S. 503, 518, 521-22 (1981) (remedy imposing "unusual hardship . . . requiring ineffectual activity or an unnecessary expenditure of time or energy" may be "inefficient;" "unusual" wait for adjudication of refund may not be "speedy"); *Spector Motor Service, Inc. v. O'Connor,* 340 U.S. 602, 605 (1951) ("uncertainty of the adequacy of a remedy in the state courts," even with later clarification by state court, provides federal jurisdiction notwithstanding Tax Injunction Act). Moreover, the North

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5. The "principles of federalism and comity" embodied in the Tax Injunction Act formed the basis of this Court's ruling in *National Private Truck Council.* 115 S. Ct. at 2354.

Carolina Supreme Court, has, in other contexts, struggled with the issue of whether North Carolina's laws provide "meaningful backward looking relief of the sort which is adequate to satisfy minimum due process requirements." *Swanson v. North Carolina,* 335 N.C. 674, 695, 441 S.E. 2d 537, 549 (Mitchell, J., dissenting), *cert. denied,* 115 S. Ct. 662 (1994). Here, the North Carolina Supreme Court was within its rights to conclude that a state remedy that required the taxpayer to pay the contested amount of taxes and which — six years later — had still resulted in no refund to the taxpayer was not "adequate" "under the particular facts presented by the present case," *Swanson,* 335 N.C. at 695, 441 S.E. 2d at 549 (Mitchell, J., dissenting).

The other state court decisions cited by the County as putatively in conflict with the decision here, *(see* Pet. Br. 7-8), were premised, in every case, on an explicit holding by the state court that the state law remedies at issue were "adequate." Thus, in *New England Legal Foundation v. City of Boston,* 423 Mass. 602, 670 N.E. 2d 152 (1996), plaintiff appealed, in pertinent part, from the trial court's decision denying attorney's fees under 42 U.S.C. § 1988. The Supreme Judicial Court of Massachusetts held that the Massachusetts procedure for recovery of back taxes "long ago was seen as providing an adequate remedy." 670 N.E. 2d at 161 (citing cases). The court specifically found that plaintiff "had adequate State procedural avenues to bring its Federal law challenges," and that under *National Private Truck Council,* "§ 1983 would therefore not provide any relief." *Id.; see also PPG Industries, Inc. v. Tracy,* 74 Ohio St. 3d 449, 659 N.E. 2d 1250, 1252 (1996) (per curiam) (affirming refusal to grant attorney's fees under 42 U.S.C. § 1988 on grounds that plaintiff" did not prove a violation of the commerce clause" and because "Ohio provides an appellate procedure to determine these constitutional claims"); *Jade Aircraft Sales, Inc. v. Crystal,* 236 Conn. 701, 674 A.2d 834, 839 (1996) (affirming dismissal of plaintiffs § 1983 claim for lack of subject matter jurisdiction on

the grounds that the Connecticut statutory scheme provided plaintiff "an opportunity to receive an adequate legal remedy"); *General Motors Corp. v. City of Linden*, 143 N.J. 336, 350, 671 A.2d 560, 566 (refusing "to recognize a section 1983 action challenging the conduct of an assessor" based on a holding that "the remedies under New Jersey law are adequate to preclude section 1983 suits in either federal or state courts"), *cert. denied*, 117 S. Ct. 66 (1996).[6]

Unlike *National Private Truck Council* and the various state court decisions cited by the County, the North Carolina Supreme Court did not rule that the state law remedies at issue here were adequate under the circumstances faced by Edward Valves. For that reason, the decision of the North Carolina is not in conflict with any decision of this Court or any decision of a state court of last resort.

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6. The intermediate state appellate court decisions cited by the County are also each premised on an explicit holding that the state provided an adequate remedy. *See, e.g., Kerr v. Waddell*, 185 Ariz. 457, 916 P.2d 1173, 1174 (Ariz. App. 1996) (holding that "Arizona's administrative tax procedure is an adequate legal remedy," and therefore the Arizona tax court "did not have subject matter jurisdiction to hear the taxpayers' § 1983 claims absent the exhaustion of their administrative remedies"); *Buckley Powder Co. v. Colorado*, 924 P.2d 1133, 1138 (Colo. App. 1996) (holding that "adequate state remedies" were available to plaintiff and that *National Private Truck Council*, "by implication," required that state courts "could not entertain damages action under 42 U.S.C. § 1983 in state tax cases when state law furnishes an adequate legal remedy"), *cert. granted in part*, 1996 Colo. LEXIS 483 (Colo. Oct. 15, 1996); *Sharp v. Direct Resources for Print, Inc.*, 910 S.W. 2d 535, 541 (Tex. App.1995) (holding that because plaintiff "received an adequate remedy under state law," it could not obtain "the declaratory relief [it] requested pursuant to § 1983").

CONCLUSION

For all the foregoing reasons, Respondent Edward Valves, Inc. respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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